

Wayang Tinggi Produksi Sdn Bhd v Aficionado Media (M) Sdn Bhd A

HIGH COURT (KUALA LUMPUR) — SUIT NO 28NCC-1066–12 OF 2011 B

HASNAH HASHIM J
4 JULY 2012

Companies and Corporations — Winding up — Inability to pay debts — Company failing to pay acknowledged debt — Whether company unable to pay debts and ought to be wound up — Failure of company to prove solvency — Whether petitioner entitled to file petition regardless of his motives — Whether sufficient notice of winding up proceeding given to company C
D

The petitioner filed the winding up petition herein against the respondent for the amount of RM30,550. The petitioner claimed that the petitioner and the respondent had entered into several joint venture agreements pursuant to which the said sum became owing to the petitioner. By a letter dated 1 April 2010 the respondent had agreed that a sum of RM327,200 was due and owing to the petitioner which the respondent subsequently paid to the petitioner by way of installments leaving a balance of RM30,550. A series of letters between the respondent and the petitioner as well as between the solicitors of the parties showed that the respondent had agreed to the amount as claimed by the petitioner. E
F

Held, allowing the petition:

- (1) Prima facie, a creditor like the petitioner here, who has not been paid has the right to file a petition for winding up whatever its other motives may be (see para 17); *Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95 referred. G
- (2) The respondent failed to pay the balance amount owing to the petitioner despite having agreed to the proposal of settlement. Thus the failure to pay by the respondent triggered the presumption that the respondent was unable to pay its debts. The respondent did not show any documentary evidence in its affidavit that it was able to pay its debts and was in fact solvent (see para 19); *Gulf Business Construction (M) Sdn Bhd v Israq Holding Sdn Bhd* [2010] 5 MLJ 34 followed. H
I
- (3) The relevant notice and papers had been duly served on the respondent and the said notice of demand was sufficient notice to the respondent that there was a pending petition and debt (see para 21).

A [Bahasa Malaysia summary]

Pempetisyen di dalam kes ini memfailkan petisyen penggulungan terhadap responden untuk jumlah sebanyak RM30,550. Pempetisyen mendakwa bahawa pempetisyen dan responden telah memasuki beberapa perjanjian bersama di mana jumlah tersebut menjadi jumlah yang terhutang kepada pempetisyen. Melalui surat bertarikh 1 April 2010 responden telah bersetuju bahawa jumlah sebanyak RM327,200 adalah kena dibayar dan terhutang kepada pempetisyen yang mana kemudiannya dibayar kepada pempetisyen melalui bayaran ansuran yang meninggalkan baki sebanyak RM30,550. Beberapa surat di antara responden dan pempetisyen dan juga di antara peguambela pihak-pihak menunjukkan bahawa responden telah bersetuju kepada jumlah seperti yang dituntut oleh pempetisyen.

Diputuskan, membenarkan petisyen:**D**

(1) Prima facie, pemiutang seperti pempetisyen di sini, yang tidak dibayar mempunyai hak untuk memfailkan petisyen untuk penggulungan apa saja kemungkinan motifnya yang lain (lihat perenggan 17); *Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95 dirujuk.

E

(2) Responden gagal membayar jumlah baki terhutang kepada pempetisyen meskipun telah bersetuju kepada penyelesaian yang dicadangkan. Oleh itu kegagalan membayar oleh responden mencetuskan anggapan bahawa responden tidak dapat membayar hutangnya. Responden tidak mengemukakan apa-apa keterangan dokumentar dalam afidavitnya yang ia boleh membayar hutangnya dan sebenarnya mampu bayar (lihat perenggan 19); *Gulf Business Construction (M) Sdn Bhd v Israaq Holding Sdn Bhd* [2010] 5 MLJ 34 diikuti.

F**G**

(3) Notis dan dokumen relevan telah diserahkan ke atas responden dan notis tuntutan tersebut adalah notis yang mencukupi kepada responden bahawa terdapat petisyen yang belum selesai dan hutang (lihat perenggan 21).]

H**Notes**

For cases on inability to pay debts, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1227–1299.

I**Cases referred to**

Gulf Business Construction (M) Sdn Bhd v Israaq Holding Sdn Bhd [2010] 5 MLJ 34; [2010] 1 LNS 360, CA (folld)

Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd [1991] 1 MLJ 95, SC (refd)

Legislation referred to

Companies Act 1965 ss 205, 217(1), 218(1), (1)(d), (m), (n), (2)(a)
Insurance Act 1996

KF Ee (Colin Liew with him) (KF Ee & Co) for the petitioner/respondent.
Agus bin Rosman (Ibrahim & Fuaadah) for the respondent/appellant.
Nartah Shahrudin (Norazlina bt Md Nasir with her) for the official receiver.

Hasnah Hashim J:

[1] Enclosure 1 is the petition dated 12 Disember 2011 filed by the petitioner against the respondent for the amount of RM30,550 due and owing.

[2] The petitioner and the respondent entered into the following joint venture agreements ('JV'):

- (a) JV dated 14 January 2009 for the production of the drama series 'Dua Marhalah';
- (b) JV dated 20 February 2009 for the production of the drama series 'Paku di Hati'; and
- (c) JV dated 28 April 2009 for the production of the drama series 'Qarnul Manazil'.

[3] Under the three JV the petitioner provided television program production financing to the respondent.

[4] The drama series under the JV was produced and sold to Astro Entertainment Sdn Bhd. Payments has been made by Astro Entertainment Sdn Bhd to the respondent. However, the respondent failed to pay the petitioner as agreed under the JV. The details of the payment arrangements under the respective JV are set out below:

A

Details

B

C

D

Production	Cost for production	Agreed profit	Amount that has to be paid from the respondent to the petitioner at that time
'Dua Marhalah'	RM208,000	RM26,000	RM234,000
'Paku di hati'	RM65,000	RM20,000	RM85,000
'Quarnul Manazil'	RM65,000	RM20,000	RM85,000
	Total =	RM404,000	
	Partial payment made by the respondent =	RM76,800	
	Total outstanding payment (taking into account the partial payment made) =	RM327,200	

E

[5] By a letter dated 1 April 2010 the respondent agreed that the sum of RM327,200 was due and owing to the petitioner.

F

[6] It was further agreed between the petitioner and the respondent that the outstanding debt shall be paid by way of installment by three post dated cheques as follows:

G

- (a) HSBC Cheque No 314580 dated 31 August 2010 amounting to RM200,000;
- (b) MIB Cheque No 079141 dated 30 September 2010 amounting to RM63,000; and
- (c) MIB Cheque No 079142 dated 31 October 2010 amounting to RM61,100.

H

[7] However, the petitioner was unable to cash the third cheque from the respondent. Subsequently the respondent gave a new cheque to the petitioner amounting to RM30,550 (HSBC Cheque No 473408 dated 12 July 2011) and a photocopy HSBC cheque from the respondent No 473409 ('post dated cheque') dated 25 July 2011 amounting to RM30,550 for the payment of the remaining outstanding debt amounting to RM61,000. The final payment of RM30,500 is still due and owing.

I

[8] It is the submission of the respondent's counsel that there is no debt due and owing to the petitioner. The total sum of RM373,450 has been fully paid by the respondent. The sum of RM30,550 is therefore not due and owing to

the petitioner. However, a series of letters (as exhibited in the petition) between the respondent and the petitioner as well as between the solicitors of the parties show that the respondent had agreed to the amount as claimed by the petitioner.

A

[9] In a letter dated 9 August 2010 (exh C) the respondent through its solicitors proposed settlement as follows:

B

We refer to the above matter and append below the proposal for settlement proposed by our client —

1. Settlement of sum of RM327,200.00 by the following modes:-
 - a) The initial sum of RM200,000.00 will be paid by 30/8/2010;
 - b) Second installment of RM63,600.00 by 30/9/2010; and
 - c) Final installment of RM63,600.00 by 30/10/2010.
2. As regard to outstanding sum RM494,000.00 our client wishes to procure from Wayang Tinggi Produksi Sdn. Bhd. the details of the statement of account before they can propose any modes of settlement; and
3. As regards to your client's request for the master copy of the Sastrawan Islam Dalam Dunia and Mirzan Cinta, we wish to inform that our client is not agreeable to the said request. This is due to the reason that our client is in the midst of securing the potential buyer for the above said projects.

C

D

E

[10] This is followed by a response from the petitioner's solicitors agreeing to the settlement proposal vide a letter dated 13 August 2012 (exh D):

F

1. Our client is agreeable to the proposal for installment payments as set out in paragraph 1 of your letter subject to Aficionado providing our client with 3 postdated cheques for the three installments.

G

[11] The respondent then forwarded the cheques as agreed vide their letter dated 2 September 2010 (exh E):

We refer to the above matter and are pleased to forward the following cheques for your further action:-

H

1. HSBC cheque No. 314580 dated 31/8/2010 for the sum of RM200,000.00;
2. MIB cheques No. 079141 dated 30/9/2010 for the sum of RM63,600.00; and
3. MIB cheque No. 079142 dated 31/10/2010 for the sum of RM61,100.00.

I

Please be informed that for the last postdated cheque dated 31/10/2010, we have been instructed that our Client shall deduct the sum of RM2,500.00 pursuant to the arrangement relating to Qamul Manzil.

- A** [12] The respondent had agreed to the amount as claimed by the petitioner and did not raised any issues as to the amount of RM30,500. The respondent through its solicitors had in fact agreed to pay that amount as indicated in the letter dated 14 July 2011 (exh K):
- B** As such, we are pleased to forward herewith our client HSBC Cheque No. 473408 for the sum of RM30,550.00 being partial payment. We also confirm that our client has deposited with us the post dated cheque dated 25/7/2010 for the sum of RM30,550.00 to make up the full payment of the outstanding sum.
- C** [13] The reason for the delay of the payments was because one of the directors of the respondent suffered a heart attack and was unable to sign the cheque as he was hospitalised. However, the cheque was subsequently signed and issued. The said director was discharged from hospital sometime in June 2010.
- D** [14] In a winding up of a company the persons who may present an petition for winding up is provided under s 217(1) of the Companies Act 1965 namely:
- E** (a) the company;
- E** (b) any creditor, including a contingent or prospective creditor, of the company;
- E** (c) a contributory or any person who is the personal representative of the deceased contributory or the trustee in a bankruptcy;
- F** (d) the liquidator;
- F** (e) the Minister pursuant to s 205 or on the ground specified under s 218(1)(d);
- G** (f) Bank Negara Malaysia if it is a licensed institution;
- G** (g) Bank Negara Malaysia in the case of a company which is licensed under Insurance Act 1996; and
- G** (h) the registrar on the ground specified in s 218(1)(m) or (n).
- H** [15] Section 218(1) of the same Act list out the circumstances a company may be wound up by an order of the court if:
- I** ... (a) the company has by special resolution resolved that it be wound up by the Court;
- I** (b) default is made by the company in lodging the statutory report or in holding the statutory meeting;
- I** (c) the company does not commence business within a year from its incorporation or suspends its business for a whole year;

- (d) the number of members is reduced in the case of a company (other than a company the whole of the issued shares in which are held by a holding company) below two; A
- (e) the company is unable to pay its debts;
- (f) the directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any manner whatsoever which appears to be unfair or unjust to other members; B
- (g) an inspector appointed under Part IX has reported that is of opinion
 - (i) that the company cannot pay its debts ...; or
 - (ii) that it is in the interest of the public or shareholder ...; C
- (h) when the period, if any, fixed for the duration of the company by the memorandum or articles expires or the event, if any, occurs ...;
- (i) the court is of the opinion that it is just and equitable that the company be wound up; D
- (j) the company held a license under the Banking and Financial Institutions Act 1989 or the Islamic Banking Act 1983 and that license has been revoked or surrendered;
- (k) the company has carried on Islamic banking business ... in contravention of the Islamic Banking Act 1983 or the Banking and Financial Institutions Act 1989, as the case may be; E
- (l) the company has held a license under the Insurance Act 1966 and -
 - (i) the license has been revoked;
 - (ii) Bank Negara has petitioned for its winding up ... F
 - (iii) an order under paragraph 59(4)(b) of the Insurance Act 1966 has been made ...
- (m) the company is being used for unlawful purposes; and
- (n) the company is being used to any purpose prejudicial to national security ... G

[16] Section 218(2)(a) of the Companies Act 1965 provides that a company shall be deemed to be unable to pay its debts if a creditor to whom the company is indebted in a sum exceeding five hundred ringgit and notice of it has been given requiring the company to pay the sum so due and thereafter neglected to pay that sum. The failure on the part of the company to pay as demanded would trigger the presumption that the company is unable to pay its debt. This presumption is rebuttable and the onus will then shift onto the respondent to show that it is able to pay the debt and serve an affidavit in opposition to the petition. H

[17] According to the case of *Morgan Guaranty Trust Co of New York v Lian* I

- A *Seng Properties Sdn Bhd* [1991] 1 MLJ 95, prima facie a creditor, like the petitioner here, who has not been paid has the right to file a petition for winding up whatever its other motives may be.
- B [18] The petitioner submits that the respondent is insolvent and unable to pay the debts. Justice Abdul Malik Ishak JCA in the case of *Gulf Business Construction (M) Sdn Bhd v Israq Holding Sdn Bhd* [2010] 5 MLJ 34; [2010] 1 LNS 360 said that:
- C The test to ascertain commercial insolvency is rather simple. It is this. That the company is unable to meet the current debts as they fall due. And such a company may still be categorised as 'unable to pay its debts' even though the company has substantial wealth which cannot be realised immediately and even though on liquidation the company will be able to meet all its liabilities.
- D [19] The respondent failed to pay the balance amount owing to the petitioner despite having agreed to the proposal of settlement. Thus the failure to pay by the respondent triggered the presumption that the respondent is unable to pay its debts. However, the respondent did not show any documentary evidence in its affidavit that it is able to pay its debts and is in fact solvent.
- E [20] The respondent also submits that it was unaware of the petition. Justice Malik Ishak in the *Gulfs* case said that:
- F The demand that is required under s 218(2)(a) of the Companies Act 1965 can be in any form. There is no prescribed form to follow. So long as there is a notice of demand that is sufficient. The purpose of the notice is to warn the debtor, like the respondent here, of an impending petition (*Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1992] 1 MLJ 313 (SC) at p 317). And the notice that is issued to the debtor must relate to a specified debt and that debt cannot be seriously questioned ...
- G [21] I find that the relevant notice and papers have been duly served on the respondent as shown in exh M and applying the principle above the said notice of demand is sufficient notice to the respondent that there is a pending petition and debt.
- H [22] I have considered the submissions and authorities of the parties and based on the above considerations and reasons I find that the petition should be allowed as there is sufficient evidence to show that the respondent is insolvent and unable to pay its debts.
Petition allowed.

I

Reported by Kanesh Sundrum